UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published October to June by the Law School of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

EFFECT OF A CHANGE OF JUDICIAL DECISION AS TO THE CONSTITUTIONALITY OF A STATUTE.—Whether a decision of the highest court is "law," the equivalent of a statute, or whether it is merely evidence of the law, has long been a mooted question. This becomes important where a decision overrules a prior decision on the same question. Under the view that a decision is merely evidence of the law, the second decision must necessarily be given a retroactive effect, while under the other view it can have only a prospective effect and cannot disturb rights acquired or liabilities incurred under the first decision. Blackstone says that the court never makes law, but simply declares what it has always been and an overruled decision never was law at all.[1] These conflicting views arise where there is a change of judicial decision as to the common or unwritten law, as to the interpretation of a statute, or as to the constitutionality of a statute. Confining ourselves to the third class of cases, there would seem to be three situations, which might arise:

[1] I Bl. Comm., p. 70.

1. A statute is enacted, rights acquired or liabilities incurred thereunder, and subsequently the statute is declared unconstitutional.

2. A statute is enacted, declared constitutional by the court, rights acquired or liabilities incurred thereunder, and subsequently the statute is declared unconstitutional.

3. The converse of the second class, the statute first being declared unconstitutional and later constitutional.

As to the first situation there is little doubt, as it is almost universally held that a statute declared to be unconstitutional is null and void from the beginning. No rights or liabilities can be built up under it. The decision is dated back to the moment the statute was enacted. This would seem to be in accord with the view that a judicial decision is merely evidence of the law, but it has been denied that it conflicts with the opposite view.[2]

The second situation is of frequent occurrence and comprises the class of case represented by Gelpcke v. Dubuque.[3] In this case, which has given rise to a great amount of discussion, the Legislature of Iowa passed a law, authorizing the issue of a certain kind of municipal bonds. This statute was declared constitutional by the Supreme Court of Iowa. Certain bonds were then issued and came into the hands of the plaintiff. After this transaction, the Supreme Court of Iowa, overruling its former decision, held the statute unconstitutional. On an appeal from the Circuit Court of Iowa to the United States Supreme Court the plaintiff's bonds were held valid, despite the latest ruling of the Iowa Supreme Court. It has been suggested by some writers that the decision rests on a question of the conflict of State and Federal jurisdiction and does not involve the principle under discussion.[4] Others hold that the decision can only be upheld on the theory that a judicial decision is a "law," and that a decision interpreting or passing on the constitutionality of a statute becomes a part of the statute itself, and a subsequent overruling decision has the same effect on it as a repeal by the Legislature has on the statute itself. Rights acquired under the first decision will be protected.[5] One writer frankly admits that this is judicial legislation, but contends that the peculiar nature of our courts permits such an effect to be given to their decisions.[6]

Whatever may be said for this view in theory, the weight of authority is decidedly against it.[7] The strongest argument and perhaps the fundamental one against it appears in a Texas case, where

---

[2] White, "Gelpcke v. Dubuque," p. 56.

[3] 1 Wall. 175.

[4] 4 Harvard Law Rev. 311; 14 Amer. Law Rev. 211.

[5] Hare's Amer. Const. Law, pp. 721-726; Patterson's Federal Restraints on State Action, pp. 146-147.

[6] White, "Gelpcke v. Dubuque," pp. 60-84.

[7] Ray v. Western Pennsylvania Co., 138 Pa. 576; Crigler v. Shepler, 79 Kan. 834; Swanson v. Ottumwa, 131 Ia. 540; King v. Phoenix Ins. Co., 195 Mo. 290.

it is said "Under the theory contended for, this court is called upon to hold that the decision of the Supreme Court of a state, although erroneously made, could give validity to a statute, which the Legislature had no power to enact and thereby deprive the citizens of the constitutional rights invaded by the statute," practically amounting to a change of the Constitution by the courts instead of by the people.[8] However, where contract rights are acquired before the overruling decision, this decision has been held to be a law within the meaning of the provision of the Constitution that no state shall pass any law impairing the obligation of contracts. Hence such contract rights cannot be disturbed. This so-called "exception" to the general rule originated in the United States Supreme Court,[9] but has since been distinctly repudiated by that court.[10] It is still followed in some States,[11] but the majority reject it on the ground that a judicial decision is not a law, or on the ground that even if it is a law it is not within the intent of the constitutional inhibition, which refers only to acts of the legislative power and not to the decisions of the judicial department.[12]

On principle it would seem that the same result should be reached in the third class of cases, as that is simply the converse of the second. For, if no vested right can be acquired under a statute erroneously declared constitutional, no vested right to escape liability or punishment should be acquired under a statute erroneously declared unconstitutional. The same fatal objection applies, namely, that it is setting the decision of the court above the Constitution. There seems to be few cases falling within this class. The situation, however, has been squarely raised in a recent Iowa case.[13] A statute was passed making it a crime to take orders for liquor within the state. The Supreme Court of Iowa declared this statute unconstitutional. After this decision the defendant took orders for liquor. Subsequently, the Supreme Court reversed itself and declared the statute constitutional. The defendant was indicted and convicted on the theory that the second decision had a retrospective effect. On appeal the conviction was unanimously reversed. Five of the six judges evade the question under discussion and decide the case on principles which will hardly bear examination. The sixth, however, meets the question squarely and holds "that a change of judicial decision involving the constitutionality of an act or construing an act of Legislature, should, like, an act emanating from the law-making power, be given a prospective rather than a retrospective operation." Also "decisions of courts construing statutes or declaring

[8] Storrie v. Cortes, 90 Texas, 283, per Brown, J.

[9] Douglass v. County of Pike, 101 U. S. 677.

[10] Central Land Co. v. Laidley, 159 U. S. 103.

[11] Haskett v. Maxey, 134 Ind. 182; Lewis v. Symes, 61 Ohio St. 471; Falconer v. Simmons, 51 W. Va. 172.

[12] See cases cited note 7, *supra*.

[13] State v. O'Neil, 126 N. W. (Ia.) 454.

them unconstitutional are as much a part of the law of the land as are legislative enactments. They become part of the body of the law itself and are not merely the evidences thereof as are decisions relating to the unwritten or common law." The cases, which fall within this section, seem to be as a whole, opposed to this view.[14] Since no contract is involved, the exception rule cannot be pleaded as a defence to the decision. The fact that it was a criminal case undoubtedly had a potent influence on the result. Natural justice is certainly upheld by the decision, for no one can doubt that it is a hard law which punishes a man for doing an act, which was expressly declared to be legal at the time he committed it. It is probably for this reason that the criminal cases involving this point have been decided on the theory that the decision makes the law,[15] although in principle there seems to be no reason for making the exception. Another reason advanced in support of these criminal cases is that the second decision is a violation of the Constitution, which prohibits the passage of any *ex post facto* law. An *ex post facto* law is one which makes an act innocent when done a crime. It would seem that the same objections lie against this argument as lie against the argument that an overruling decision is a law impairing the obligation of contracts.

A. S. S., Jr.

DONATIO MORTIS CAUSA.—In the recent case of Scott v. Union & Planters' Bank and Trust Co., *et al.*,[1] decided by the Supreme Court of Tennessee, it was sought by the complainant to have established, by a decree of the court, two gifts, alleged to have been made under circumstances which constitute a valid gift in prospect of death. The validity of the gifts was attacked principally on the ground of insufficient delivery. In the opinion, which granted the prayer of the bill, the court takes up and discusses the question of what is a sufficient delivery in *donatio mortis causa*. The conclusion reached may best be stated in the language of the court: "An examination of the modern cases all show, while courts will scrutinize with care the evidence upon which gifts *causa mortis* are sought to be sustained, and will require in every case clear and convincing proof, yet when it is once ascertained that it is the intention of the donor to make such a gift, and all is done which is possible under the circumstances in the matter of delivery, the gift will be sustained." Throughout the opinion and in the cases cited, the intention of the donor is emphasized as the pivotal point and criterion in the determination of what should be deemed a delivery in law so as to make

[14] Pierce v. Pierce, 46 Ind. 86; Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56.

[15] State v. Bell, 136 N. C. 674; State v. Fulton, 149 N. C. 485. See also Boyd v. State, 53 Ala. 608.

[1] 130 S. W. 757.